

1 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
2 FOR THE STATE OF WASHINGTON

3 CATHERINE BRYANT, KENT W.)
4 SARGEANT, ROBERT P. SHEEHAN,)
5 and ESTHER R. SHEEHAN,)
6 Appellants,)
7 v.)
8 STATE OF WASHINGTON, DEPARTMENT)
9 OF ECOLOGY, RONALD SHER AND)
10 WALLY GUDGELL,)
11 Respondents.)
12

PCHB No. 87-245

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

11 This matter, the appeal on Order (No. De 87-N265) approving a
12 permit to withdraw domestic water from a well on Orcas Island, came on
13 for hearing before the Pollution Control Hearings Board, Wick Dufford,
14 Chairman, presiding, on May 10, 1988, in Mount Vernon, Washington.
15 Board member Judith A. Bendor has reviewed the record.

16 Appellant Bryant represented herself. Intervener appellants
17 Sargeant and Sheehan did not appear. Respondent Department of Ecology
18 was represented by Peter R. Anderson, Assistant Attorney General.
19 Wally Gudgell represented himself and his co-applicant Sher.

20 Witnesses were sworn and testified. Exhibits were examined.
21 From the testimony heard and exhibits examined, the Board makes these
22
23
24
25
26
27

1 FINDINGS OF FACT

2 I

3 Years ago, perhaps as early as 1936, a hand dug well was
4 constructed as a source for domestic water at a location 675 feet
5 south and 638 feet west from the northeast corner of Section 21,
6 within Government Lot 1, Section 21, Township 36 North, Range 2 West,
7 Willamette Meridian. The site is on Orcas Island, a short distance
8 north and west of the Orcas ferry landing.

9 On March 15, 1970, William C. Bryant, the owner of the property
10 where the well is located filed a Water Right Claim with reference to
11 this domestic well.

12 II

13 Bryant's property included a tract, some distance from the well
14 site, lying slightly to the east of the ferry landing, within the NW
15 1/4, Sec. 22, T. 36 N., R. 2 W., W. M. This parcel has been served
16 with domestic water from the well since at least 1970, when the
17 original dug well was replaced with a deeper drilled well.

18 In June, 1977, Magnus P. Berglund purchased the tract east of the
19 ferry landing, in an agreement which included rights to water from the
20 well. The parcel contains a white cottage dating from the 1930s, a
21 shop building built in the 1950s, and an A-frame constructed in the
22 early 1970s, all of which are presently served by pipeline from the
23 well.

24
25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

PECH No. 87-245

(1)

The site of the well is still retained in the Bryant family.

III

On March 14, 1980, Berglund applied to the Department of Ecology for a ground water appropriation permit authorizing the domestic supply from the well for the structures on the property he had acquired.

In late 1981 or early 1982, Berglund sold to Ronald Sher and Wallace Gudgeon and, thereafter, assigned to them his interest in the ground water application. At around the same time, an action was prosecuted in San Juan County Superior Court to quiet title to the interest in the well water which had been conveyed to Berglund when he purchased.

The Superior Court, in Cause No. 3920, quieted title in plaintiff's Sher and Gudgeall to a three-quarters interest in the well, stating:

Said plaintiffs ... have the right to withdraw three-quarters of the water from said well together with the right to go upon the property of defendants Bryant for the purpose of maintaining said well, and related necessary improvements including the water lines between said well and the property of plaintiffs described on the contract.

IV

On October 26, 1987, Ecology issued Order No. DE 87-N265 by which it approved the issuance of a ground water permit to Sher and Gudgell to withdraw water from the well at a rate of three gallons per minute, limited to 1.25 acre feet per year for continuous domestic supply for

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PECH No. 87-245

1 the two single family residences and a shop.

2 The Report of Examination accompanying the Order referred to the
3 San Juan County Superior judgment and stated:

4 It is understood that the court-ordered decree
5 determines the actual quantity of water applicants
6 can withdraw from the Bryant well. The maximum
7 quantities of 3 gpm and 1.25 acre-feet per year are
8 thus maximum quantities only, recognizing that
9 often--especially during the drier seasons--a much
lower rate may be necessary to prevent seawater
intrusion and commensurate with declining water
supplies.

10 The report of Examination did not specify any date for the permittees
11 to submit proof of appropriation.

12 V

13 Catherine Bryant is the daughter of William C. Bryant and the
14 successor to the Bryant holdings. During the course of Ecology's
15 processing of the Sher and Gudgell application, she protested the
16 issuance of a permit, expressing objections to the rate of withdrawal
17 and a fear of seawater intrusion into her well.

18 On November 5, 1987, Ms. Bryant appealed Ecology's approval of
19 the Sher/Gudgell permit to this Board. Kent Sargeant and Robert P.
20 Sheehan and Ester R. Sheehan later intervened in opposition to the
21 permit but took no part in the case beyond filing letters of
22 position.

23 VI

24 The well penetrates unconsolidated deposits which overlies a bowl

1 of bedrock in the immediate area. These deposits are recharged by
2 precipitation and by run off from all directions. The well is
3 believed to be 126 feet deep.

4 Measurements taken in 1982 and 1988 show that the static water
5 level has remained between 28 and 29 feet below ground surface.
6 Fluctuations in production of this and other wells in the area likely
7 reflect seasonal ground water table fluctuations. Notwithstanding
8 drought conditions in recent years, there is no evidence of a
9 long-term decline in the water table.

10 Moreover, there is no evidence that normal operation of the
11 system serving the Sher/Gudgell property causes well interference,
12 adversely affecting other ground water systems in the vicinity.

13 VII

14 The well in question is located about 400 feet east of the
15 seawater in West Sound at a ground surface elevation of about 35 feet
16 above sea level. The bottom of the well is, thus, thought to be about
17 91 feet below mean sea level.

18 There is no evidence of high chloride counts from wells in this
19 area of Orcas Island. Over the many years of its operation, the well
20 serving the Sher/Gudgell property has developed no indications of sea
21 water intrusion.

22 VIII

23 Standard quantity allocations for domestic service used by
24

1 Ecology encompass a range between .25 and 1.0 acre foot per service.
2 Here the 1.25 acre feet assigned is well within the range, being
3 calculated at an annual allowance of .5 acre foot per house and .25
4 acre foot for the shop.

5 A withdrawal rate of 3 gpm, however, even if utilized all day
6 every day, would not produce enough water yearly to reach the 1.25
7 acre foot allocation. Indeed, a well pumped continuously for 24 hours
8 at 3 gpm would yield less than 5,000 gallons, which is the amount per
9 day for domestic use which the legislature has provided is exempt from
10 the ground water permit requirement. RCW 90.44.050.

11 All this underscores that the 3 gpm at issue is a very modest
12 aggregate withdrawal rate for the three services contemplated.
13 Nevertheless, the 3 gpm rate does not represent a constant demand on
14 the system. The uses will not require withdrawals on a 24 hour a day
15 basis. Faucets will be turned on only sporadically. The actual
16 quantities used will be far less than what the continuous
17 instantaneous withdrawal of 3 gpm would yield.

18 IX

19 Ms. Bryant testified that the present system has always provided
20 only a minimal water supply. She said that over the last 10 years,
21 the production of the well has been getting worse.

22 A pump test conducted in March, 1980, showed that the well
23 presently can yield .6 gpm at equilibrium with a draw down of around
24

1 12 feet. Recovery of the static level after pumping is rapid.

2 X

3 When the Report of Examination was written in October, 1987,
4 Ecology's inspector believed that the well was capable of yielding 4
5 gpm. The 3 gpm allowed to Sher and Gudgell was intend to represent
6 their 3/4 interest in the well's production under the Superior Court
7 decree.

8 However, the permitted appropriation can only be perfected at the
9 rates actually achieved in operation. If over time the well yields no
10 more than .6 gpm, then the appropriation of Sher and Gudgell will be
11 limited to what can be produced, taking into account the need to
12 insure that the 1/4 interest retained by Catherine Bryant is never
13 impaired.

14 XI

15 Objections to the permit appear to be based on the idea that Sher
16 and Gudgell are being granted an enlargement of their present use. We
17 find no evidence of an intention to enlarge the use and we are
18 convinced that Ecology has attempted only to authorize the historic
19 level of use, as conditioned by the Superior Court decree.

20 If the numerical values assigned by the agency exceed what the
21 well will yield, Sher and Gudgell cannot acquire certificated rights
22 equal to these values. Their appropriation will be limited by the
23 physical realities.

XII

Between the Sher and Gudgell parcel and the well on Bryant's property are intervening ownerships. Sher and Gudgell must acquire easements or other appropriate permission to transport the water over this intervening land. Failure to do so could prevent them from exercising any rights they might otherwise acquire under their appropriation permit.

The permit at issue is the state's permission to take water from a certain point and to use it for a stated purpose at another point. Questions of how to get the water from one place to the other must be resolved between the private property owners concerned, and are not issues before this Board.

XIII

This record contains no evidence that use of the well in question for domestic purposes has in the past been harmful to human health. There is no evidence of any present restriction on its use for such purposes by public health authorities.

XIV

The Orcas Village neighborhood around the ferry landing is, in the main, provided with water by a water users association which takes water from several wells in the near vicinity of the well at issue here. In recent years, this community system has suffered chronic water shortages. Increased demand on this community system will, of

course, exacerbate the problems unless additional sources are found.

However, the long-standing use of the well at issue does not represent an increased demand on the aquifer. There is no evidence that use of this well is the source of the community system's problems or that its continued use will make a difference in this regard.

XV

Sher and Gudgell do not live on the parcel involved here. The two dwellings and the shop are used as rental units. Since taking over these units, Sher and Gudgell have established an unenviable record of neglect in the operation, maintenance, and upkeep of the system. They have failed to insure that leaks are detected and timely stopped, that breakdowns are quickly remedied, that the well equipment and appurtenant transmission lines are adequately inspected and maintained in good working order.

XVI

We find that water is available from the well to serve the three identified domestic uses on the Sher/Gudgell property and that such uses are beneficial uses.

XVII

We find that appropriation of water for domestic purposes within the rate and quantity set or within the capacity of the well--whichever is less--will not impair existing rights, so long as the court decree is not violated.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PECH No. 87-245

XVIII

We find that use of the well as authorized, will not be detrimental to the public interest in insuring that adequate supplies of potable water are available for domestic use, so long as the system is properly operated and maintained by the permittees. To insure that the public interest is served by this development, the permit should be conditioned as follows:

- 1) The permittees shall maintain the domestic water system authorized in good operation and repair.
- 2) The permittees shall establish a program of routine inspection and maintenance of the system which shall be approved by the Department of Ecology.
- 3) If the approved inspection and maintenance program is not followed or if failures occur to the system which are not immediately remedied, the Department may rescind this permit or otherwise take steps to enforce the good operation and repair requirement.

XIX

We find that use of the well, as authorized, will probably not result in sea water intrusion, but that there is a risk of such intrusion if the limited aquifer is overstressed. The public interest necessitates that the permit be conditioned explicitly to insure that sea water intrusion is not allowed to occur. The permit will be in accord with the public interest if it contains the following conditions:

- 1) The permittees shall sample the water in the well at least every six months and cause these samples to be analyzed for chlorides. The results of each

1 sampling will be filed with the Department of
2 Ecology with a copy sent to Catherine Bryant or her
3 successor in interest.

4 2) If chloride counts increase to a point indicative
5 of the onset of sea water intrusion, the permittees
6 shall adjust the pump intake level to be above mean
7 sea level or make appropriate reductions in pumping
8 rate as required by the Department of Ecology.

9 3) If the above measures do not arrest the problem,
10 the permittees shall, upon notification by the
11 Department of Ecology, cease all further withdrawals.

12 XX

13 There is evidence of the existance of other wells with more
14 satisfactory and reliable water yields which could be used to furnish
15 the Sher/Gudgell property.

16 XXI

17 Any Conclusion of Law which is deemed a Finding of Fact is hereby
18 adopted as such.

19 From these Findings of Fact the Board comes to these

20 CONCLUSIONS OF LAW

21 I

22 The Board has jurisdiction over these parties and these matters.
23 Chapters 43.21B RCW and 90.44 RCW.

24 II

25 The ground water code incorporates the provisions of the surface
26 water code relative to the processing of applications for permits to
27 appropriate. RCW 90.44.060.

28 FINAL FINDINGS OF FACT,
29 CONCLUSIONS OF LAW AND ORDER

30 PECH No. 87-245

(10)

1 Under RCW 90.03.290 the Ecology department has a duty "to
2 investigate all facts relevant and material to the application" and to
3 determine 1) whether water is available, 2) whether the proposed use
4 is beneficial, 3) whether existing rights will be impaired, and 4)
5 whether the appropriation will be detrimental to the public interest.
6 Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166
7 (1973).

8 III

9 The "public interest" criterion of RCW 90.03.290 is, to some
10 degree, fleshed out by the declaration of water management
11 fundamentals in RCW 90.54.020. Among the policies there stated is a
12 prohibition, in general, against water allocations which will result
13 in degraded water quality. Another of the policies speaks to
14 preserving and protecting adequate and safe supplies of water in
15 potable condition to satisfy human domestic needs.

16 IV

17 Given our Findings, we conclude that Ecology's Order approving
18 the permit to Sher and Gudgell was correct under the criteria of RCW
19 90.03.290, as supplemented by RCW 90.54.020, if:

- 20 1) The conditions specified in Findings of Fact
21 XVIII and XIX are included in the permit when
22 issued.
- 23 2) A date for proof of appropriation is
24 established, so that the actual rate and
25 quantity of use by the system can be
26 reflected on the Certificate of Right.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

V

In light of the marginal reliability of the supply from the well in question and the burden of system maintenance and repairs, permittees may wish to look to other sources of water for the property concerned. If the system authorized by the permit is abandoned, or if proof of appropriation is not made within the time specified, the permit may be cancelled. RCW 90.03.320; RCW 90.14.180.

VI

Ms. Bryant is under no obligation with regard to the proper operation of the Sher/Gudgell system. She does, however, have sufficient interest in the production of the well to insure that water withdrawn from it is not wasted contrary to the policy of RCW 90.03.005 and RCW 90.03.400.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The approval by the Department of Ecology of Ground Water Permit Application No. G1-23591 is affirmed, provided that the permit issued in response thereto complies with Conclusions of Law IV above.

DONE this 6th day of December, 1988.

POLLUTION CONTROL HEARINGS BOARD


WICK DUFFORE, Presiding


JUDITH A. BENDOR, Member